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No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an employee's agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission, as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as backpay, reinstatement, and damages.

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	10
Argument:	
I. The EEOC's statutory authority to obtain victim-specific relief in a public enforcement action does not conflict with the terms or policies of the Federal Arbitration Act	15
A. The Fourth Circuit's result is inconsistent with the text and structure of Title VII	17
B. The FAA does not support any limitation on the remedies the antidiscrimination laws make available to the EEOC, because the FAA's terms and policies are fully vindicated by holding the complainant to his agreement to arbitrate	23
II. Because the EEOC seeks to vindicate the public interest when it seeks victim-specific remedies, there is no basis for a conclusion that it merely represents private parties in such cases or should be bound by private agreements	27
A. Congress's broadening of the public enforcement role in 1972 beyond "pattern or practice" cases was based on the premise that there is a strong public interest in remedying individual cases of discrimination	28
B. This Court has frequently recognized the broad public purposes served by victim-specific remedies	31

Table of Contents—Continued: Page

C. Preventing the EEOC from recovering victim-specific remedies in any case in which there is a private arbitration agreement would seriously compromise the EEOC's ability to enforce the antidiscrimination statutes 33
D. There are no other countervailing policy considerations that counsel against allowing the EEOC to obtain the full range of statutory remedies 38
Conclusion 42

TABLE OF AUTHORITIES

Cases:

AT&T Techs., Inc. v. *Communications Workers*, 475 U.S. 643 (1986) 24
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 13, 31, 37
Alden v. *Maine*, 527 U.S. 706 (1999) 41
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 38
Armendariz v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) 16
Blim v. *Western Elec. Co.*, 731 F.2d 1473 (10th Cir.), cert. denied, 469 U.S. 874 (1984) 32
Board of Trustees of the Univ. of Ala. v. *Garrett*, 121 S. Ct. 955 (2001) 15, 41
Circuit City Stores, Inc. v. *Adams*, 121 S. Ct. 1302 (2001) 14, 36, 40
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 32
Cole v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) 16

Cases—Continued: Page

Donovan v. *Cunningham*, 716 F.2d 1455 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) 33
Duffield v. *Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), cert. denied, 525 U.S. 982 and 525 U.S. 996 (1998) 16
EEOC v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) 39
EEOC v. *General Elec. Co.*, 532 F.2d 359 (4th Cir. 1976) 7
EEOC v. *General Lines, Inc.*, 865 F.2d 1555 (10th Cir. 1989) 36
EEOC v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987) 39
EEOC v. *Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993) 39
EEOC v. *Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984) 20-21
EEOC v. *Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997) 20
EEOC v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) 23, 29
EEOC v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) 39
EEOC v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999) 36
General Tel. Co. of the N.W., Inc. v. *EEOC*, 446 U.S. 318 (1980) ..... *passim*
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 8, 15, 22, 31, 40, 41
Green Tree Fin. Corp. v. *Randolph*, 121 S. Ct. 513 (2000) 16
Herman v. *South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998), cert. denied, 525 U.S. 1140 (1999) 33

Cases—Continued: Page

Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 32
McKennon v. *Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) 31, 36
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 22, 24
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 31
Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 22
Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) 22
Secretary of Labor v. *Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) 33
Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290 (1985) 21
United States v. *N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973) 31
United States v. *W.T. Grant Co.*, 345 U.S. 629 (1953) 36
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 24
Wright v. *Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) 22

Statutes, regulation and rule:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 40
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*:
42 U.S.C. 12101 2
42 U.S.C. 12117(a) 4
42 U.S.C. 12212 22
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*) ..... *passim*
42 U.S.C. 2000e (§ 701, 78 Stat. 253) 2
42 U.S.C. 2000e-4(b)(2) 21, 22
42 U.S.C. 2000e-5(a) 3, 17
42 U.S.C. 2000e-5(b) 3, 20, 22

Statutes, regulation and rule—Continued: Page

42 U.S.C. 2000e-5(f)(1) (§ 706(f)(1), 78 Stat. 260-261) 3, 4, 17, 20, 22, 25
42 U.S.C. 2000e-5(f)(3) 4, 21
42 U.S.C. 2000e-5(g) (§ 706(g), 78 Stat. 261) 4, 17, 18
42 U.S.C. 2000e-5(g)(1) 4, 17, 39
42 U.S.C. 2000e-6 (1970) 28
42 U.S.C. 2000e-6(c) 3
Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 37
§ 102, 105 Stat. 1072 (42 U.S.C. 1981a(a)(1)) 4, 18
§ 102, 105 Stat. 1072 (42 U.S.C. 1981a(a)(2)) 5, 18
§ 102, 105 Stat. 1073 (42 U.S.C. 1981a(d)(1)(A)) 4
§ 102, 105 Stat. 1073 (42 U.S.C. 1981a(d)(1)(B)) 5, 19
Federal Arbitration Act, 9 U.S.C. 1 *et seq.* 6
9 U.S.C. 16(a)(1) 7
29 C.F.R. 1601.10 20
Fed. R. Civ. P. 23 29

Miscellaneous:

118 Cong. Rec. 4941 (1972) 28, 30
137 Cong. Rec. 28,860-28,861 (1991) 18
Daily Lab. Rep. (BNA) (Mar. 24, 2000) 26
H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) 37
S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 28
www.eeoc.gov/stats/litigation.html 26

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 7-35[1]) is reported at 193 F.3d 805. The opinions of the district court (Pet. App. 30a-34a) and of the magistrate judge (Pet. App. 37a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1999. A petition for rehearing was denied on January 14, 2000 (Pet. App. 35a-36a). On April 4, 2000,

[1] We have reprinted the opinion of the court of appeals in the Joint Appendix, because the footnotes to that opinion are misnumbered in the version reprinted in the appendix to the petition for certiorari.

the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 15, 2000, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans With Disabilities Act of 1990, the Civil Rights Act of 1964, and the Federal Arbitration Act are reproduced at Pet. App. 54a-63a.

STATEMENT

Eric Scott Baker filed a claim with the Equal Employment Opportunity Commission (EEOC) alleging that his employer, respondent Waffle House, Inc., had discharged him on the basis of disability, in violation of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101. In response to that claim, the EEOC brought this action against respondent in the United States District Court for the District of South Carolina, alleging that respondent had engaged in unlawful employment practices against Baker on the basis of disability. The court of appeals held that Baker and respondent had entered into an agreement to arbitrate employment-related disputes, and that while the EEOC was free to seek general injunctive relief, the agreement between Baker and respondent precluded the EEOC from obtaining other, victim-specific forms of relief, such as back pay, reinstatement, and compensatory and punitive damages. The court of appeals accordingly instructed the district court to dismiss the claims for those forms of relief.

1. When the EEOC was originally created by Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253, it was not authorized to bring suit against employers. Title VII as originally enacted

authorized only a private right of action by employees and a public right of action by the Attorney General in cases involving a "pattern or practice" of discrimination. See generally *General Tel. Co. of the N.W., Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980). The EEOC was given the authority to process charges of discrimination and, if possible, to work out conciliation agreements with employers, but it was not authorized to bring suit against an offending employer. *Ibid.* In 1972, Congress amended Title VII to provide the Commission with independent authority to bring suit in court, in both individual cases, see 42 U.S.C. 2000e-5(a) and 42 U.S.C. 2000e-5(f)(1), and "pattern or practice" cases, see 42 U.S.C. 2000e-6(c).[2]

The 1972 amendments created a dual system of private and public enforcement, in which "[t]he EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 was not superseded." *General Tel.*, 446 U.S. at 326. Before any suit can be brought, a charge must be filed with the EEOC by or on behalf of an aggrieved person or by a member of the EEOC. The EEOC investigates the charge. 42 U.S.C. 2000e-5(b). If the EEOC finds reasonable cause to believe that discrimination has occurred, it must attempt to conciliate the charge; if that effort is unsuccessful, the EEOC may choose to bring a public enforcement action in its own name. 42 U.S.C. 2000e-5(b), 2000e-5(f)(1). The forum for such an action is any federal district court within the State in which the unlawful practice occurred, the district in which the employment records are maintained, the district in

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[2] The Attorney General retains enforcement authority over cases involving a "government, governmental agency, or political subdivision." 42 U.S.C. 2000e-5(f)(1).

which the aggrieved person would have worked but for the unlawful practice, or, if the employer is not present in those districts, the district in which the employer has its principal office. 42 U.S.C. 2000e-5(f)(3).

If the EEOC files suit, an employee may intervene in the EEOC action but may not initiate a suit in the employee's own name. 42 U.S.C. 2000e-5(f)(1). If the EEOC fails to act within certain designated time periods or determines that it will not itself file a suit and so notifies the employee, the employee may bring a private suit under Title VII. 42 U.S.C. 2000e-5(f)(1). Regardless of whether the action is brought by the EEOC or by an employee, the relief available includes the full range of equitable relief including injunctive relief, back pay, and reinstatement. 42 U.S.C. 2000e-5(g)(1). See *General Tel.*, 446 U.S. at 324. In 1991, Congress expanded the relief available to a "complaining party"—defined to include both private plaintiffs and the EEOC, see 42 U.S.C. 1981a(d)(1)(A)—to include compensatory and punitive damages (as limited by the applicable statutory cap). See 42 U.S.C. 1981a(a)(1). The provisions authorizing the EEOC to initiate an enforcement action do not distinguish between general injunctive relief and victim-specific remedies.

Title I of the ADA outlaws discrimination in employment on the basis of disability. Title I expressly incorporates "[t]he powers, remedies, and procedures set forth in [Title VII]." 42 U.S.C. 12117(a). That includes the procedures outlined above applicable to enforcement actions brought by the Commission and the equitable relief available under 42 U.S.C. 2000e-5(g). In 1991, at the same time as it made damages available to a "complaining party" in a Title VII suit, 42 U.S.C. 1981a(a)(1), Congress in identical terms made the same forms of damages available to a "complaining party" in

an ADA suit. 42 U.S.C. 1981a(a)(2). The term "complaining party" was defined for ADA purposes—as for Title VII purposes—to include both private plaintiffs and the EEOC. 42 U.S.C. 1981a(d)(1)(B).

2. This case involves a public enforcement action brought by the EEOC. Eric Scott Baker applied for a position with respondent on June 23, 1994. J.A. 8. Baker filled out an employment application that included the following provision:

> The parties agree that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions, or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration.

J.A. 59.[3]

Baker began working for respondent on August 10, 1994. J.A. 9. Baker had a seizure disorder. On August 26, 1994, he had a seizure that lasted approximately 30 seconds just after arriving for work. He went home for the day, and the manager told him not to report for work because of his disorder. On September 5, 1994,

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[3] The facts recited in text are undisputed. Baker, however, was not employed by the store in Columbia, South Carolina, to which he submitted his employment application, but instead was employed by another of respondent's facilities in West Columbia, South Carolina, without filling out another employment application. Because of these and other facts, summarized at Pet. 5 n.1, the district court concluded that the arbitration clause in the application for the job in Columbia did not govern the job in West Columbia, while the court of appeals reached the opposite conclusion.

respondent terminated Baker's employment. J.A. 9; Pet. App. 32a.

Baker filed a charge of discrimination with the EEOC, complaining that his discharge violated the ADA. He did not submit a claim against respondent for arbitration. The EEOC initiated this enforcement action in September 1996, after attempts to conciliate Baker's charge failed. J.A. 36; Pet. App 40a. The EEOC filed the action in its own name "to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices." J.A. 36. The EEOC sought several forms of relief to address respondent's actions: an injunction barring respondent from employment discrimination on the basis of disability, an order requiring respondent to institute anti-discrimination policies and practices to create opportunities and eradicate the effects of past and present disability discrimination, back pay and reinstatement for Baker, compensation for pecuniary and non-pecuniary losses suffered by Baker, and punitive damages. J.A. 39-40.

In response to the EEOC's complaint, respondent filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to compel arbitration and to stay or dismiss the EEOC's enforcement action. The matter was referred to a magistrate judge, who filed a report concluding that Baker had entered into an arbitration agreement with respondent covering the instant claim. The magistrate judge recommended that the motion to dismiss the EEOC's action be denied, but that the motion to compel arbitration be granted and the proceedings in this case be stayed pending arbitration. J.A. 10-11; Pet. App. 33a.

The district court disagreed with the magistrate judge's conclusions. The court held that there was no enforceable arbitration agreement because Baker never agreed to arbitrate with respect to the specific job for which he was hired. See note 3, *supra*. Because there had been no agreement to arbitrate, the court denied the motion to dismiss and the motion to compel arbitration. Pet. App. 34a.

3. Respondent filed an interlocutory appeal pursuant to 9 U.S.C. 16(a)(1). A divided panel of the court of appeals reversed the district court's finding that there had been no agreement to arbitrate between Baker and respondent. J.A. 13. The court held that Baker's application "did form a binding arbitration agreement" between Baker and respondent. J.A. 13. The court then addressed the question of what effect, if any, the agreement between Baker and respondent had on the EEOC's enforcement action.

The court of appeals recognized that, "[i]n enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to 'advance the public interest in preventing and remedying employment discrimination.'" J.A. 13 (quoting *General Tel.*, 446 U.S. at 331). See also J.A. 14 (EEOC is not "merely an institutional surrogate for individual victims of discrimination"). Referring to the 1972 amendments to Title VII that had vested the EEOC with power to bring enforcement actions in its own name, the court noted that "it was clear that Congress intended by these [1972] Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." J.A. 14 (quoting *EEOC* v. *General Elec. Co.*, 532 F.2d 359, 373 (4th Cir. 1976)). The court explained that

Congress intended "to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact." J.A. 15.

From this statutory background, the court reached two conclusions. First, the court concluded that respondent "cannot succeed on its motion to compel the EEOC to arbitrate." J.A. 19. That conclusion was based on the court's recognition "that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate," J.A. 18, and that "the EEOC is not a party to any arbitration agreement," J.A. 18. The court stated that "the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest," J.A. 18—an argument that "disregards the EEOC's independent statutory role," J.A. 18. The court also noted that this Court had "recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements." J.A. 19 (citing *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)). Accordingly, the EEOC cannot be compelled to arbitrate pursuant to a private arbitration agreement to which it is not a party. J.A. 19.

Second, the court concluded that even though an employee's agreement to arbitrate does not bind the EEOC directly, it does preclude the EEOC from obtaining victim-specific relief—such as back pay, reinstatement, or damages—in a public enforcement action. Although the court acknowledged the federal statute giving the EEOC a distinct cause of action, it emphasized the federal policy "to give [an arbitration] contract effect in order to favor the arbitration mechanism for dispute resolution." J.A. 20. In the court's view, "[t]o permit the EEOC to prosecute in court Baker's individual claim * * * would significantly trample this

strong policy favoring arbitration." J.A. 20. The court stated that, "[b]ecause Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself." J.A. 20. The court concluded that "[t]he EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, but * * * it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims." J.A. 20 (internal citation omitted). The court thus distinguished between the EEOC's ability to seek general injunctive relief, which is not affected by the private arbitration agreement, and the EEOC's ability to seek victim-specific relief, which is barred by such an agreement.

As applied to this case, the court thus held that the EEOC could seek to enjoin respondent generally from engaging in discriminatory actions and it could seek an order directing respondent to carry out practices and programs to provide equal employment opportunity and eradicate the effects of past and present discrimination. J.A. 21-22. Those remedies, the court believed, furthered "the public interest in a discrimination-free workplace" and, thus, transcended any limitation imposed by Baker's agreement to arbitrate. J.A. 22. But the court held that the EEOC "cannot pursue Baker's individual remedies in court," such as "backpay, reinstatement, and compensatory and punitive damages." J.A. 23. Because the EEOC had stated that it had no intention to pursue those remedies in arbitration, the court "d[id] not reach the question of whether the EEOC is *authorized* to do so." J.A. 23. The court

remanded the case "with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted on behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief." J.A. 23-24. The court did not reach the question "whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks." J.A. 24 n.3.

Judge King filed a dissenting opinion, which focused on the issue of whether Baker and respondent had entered into an arbitration agreement with respect to the particular job for which he was hired. See note 3, *supra*; Pet. 5 n.1. He agreed with the district court that no such agreement had been reached, and he therefore did not address what effect a valid arbitration agreement would have on the EEOC's ability to litigate in its own name. J.A. 28. Judge King also suggested that the arbitration agreement might be unenforceable in any event because the arbitration clause was so inconspicuous that it was difficult to discern, J.A. 33 n.8; see J.A. 59, and because it provided for employer and employee to bear the costs of arbitration equally, J.A. 33 n.8. The issue of the agreement's validity and enforceability were not raised in the petition and, thus, are not before this Court.

SUMMARY OF ARGUMENT

The EEOC has the undisputed authority to examine claims of discrimination brought before it, to attempt to conciliate those it deems meritorious, to decide which ones are of sufficient public import to warrant the expenditure of public enforcement resources, and, if conciliation proves unsuccessful, to litigate those claims in federal court. Congress has expressly provided that the EEOC may obtain all of the forms of relief

authorized by statute in such cases, including victim-specific relief such as back pay, reinstatement, and compensatory and punitive damages. Nonetheless, the court of appeals held that a private arbitration agreement and a general federal policy favoring arbitration trumped the EEOC's statutory right to pursue victim-specific relief in this case. This Court should uphold the EEOC's statutory right to litigate in its own name and reverse the decision below.

I. The court of appeals' result is inconsistent with the plain language and structure of the Title VII (and ADA) enforcement scheme. Congress expressly provided in Title VII that the EEOC may bring a public enforcement action to obtain all forms of relief authorized by statute, and it underscored that determination when it added a damages remedy in 1991 and expressly included the EEOC among the parties that may obtain damages. The EEOC thus may choose from among all forms of relief authorized by the statute, whether victim-specific or general in nature—including injunctive relief, back pay, and damages—in deciding how best to serve the public interest in a particular case. The court of appeals' holding is inconsistent with the text of the statute, because it denies the EEOC the right to pursue forms of relief that the statute specifically authorizes it to pursue.

In addition, the structure of the Title VII enforcement scheme gives the EEOC rights to sue that are independent of and superior to those of private plaintiffs. The EEOC has an exclusive period after a charge is filed in which to decide whether to file suit and, if it does so, the private complainant is limited to intervention in the EEOC's suit. Moreover, the EEOC may initiate and maintain its suit, even if the victim of the alleged discrimination does not want the suit to go

forward. And of particular note here, the EEOC has sole choice of forum when it chooses to bring suit. The court of appeals' result is inconsistent with those statutory provisions, because it gives the private complainant—not the EEOC—control over the litigation. In particular, it gives the private litigant the ability to select the forum in which to obtain victim-specific relief by agreeing to resolve private employment-related disputes in an arbitral forum.

The court of appeals attempted to justify its departure from the Title VII enforcement scheme by elevating the policies underlying the FAA over the text of Title VII and the ADA. The court of appeals reasoned that, when an employee has signed an arbitration agreement, the federal policy favoring arbitration trumps Title VII. There is, however, no conflict between Title VII and the FAA, and any tension between Title VII's text and the FAA's policy should be resolved in favor of Title VII's text. The terms and policies of the FAA favor the enforcement of arbitration agreements to which a party has agreed. The EEOC, however, has not agreed to arbitrate. Accordingly, the terms and policies of the FAA are fully vindicated by permitting the EEOC to litigate in the judicial forum specified by Congress in Title VII, while giving the agreement its appropriate force if and when the employee seeks to intervene in the EEOC's action. The EEOC's ability to bring a distinct enforcement action is not something the employee can bargain away.

II. The reasoning of the court of appeals is flatly inconsistent with the policies reflected in Congress's structuring of the Title VII enforcement scheme. Under the original Title VII enforcement scheme, a public enforcement action would lie only in a case involving a "pattern or practice" of discrimination. Such

a case would presumably be one in which "broad injunctive relief" would be warranted. In 1972, Congress expanded the public enforcement role, however, by giving the EEOC the authority to litigate cases involving individual acts of discrimination. As this Court recognized in *General Telephone*, that expansion reflected Congress's determination that there can be a strong public interest, sufficient to warrant public enforcement, in identifying discrimination and remedying it even in such individual cases. The court of appeals' conclusion that the public interest in obtaining victim-specific relief is necessarily "minimal," J.A. 21, conflicts with the determinations Congress made in expanding the EEOC's enforcement role in 1972.

The reasoning of the court of appeals conflicts as well with this Court's oft-repeated recognition that victim-specific remedies are vital to the public goals of the antidiscrimination statutes. Back pay serves a powerful deterrent purpose because it provides the "spur or catalyst" for the defendant to eliminate discriminatory practices and for other employers not to adopt such practices. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Reinstatement likewise not only benefits the reinstated employee, but also sends a powerful message to others in the workplace that discrimination will not be tolerated. Punitive damages, when appropriate, clearly serve a predominantly public purpose by punishing the defendant and deterring others. There is no doubt that victim-specific remedies serve a private compensatory purpose as well. In the end, however, there is no basis in the statute to distinguish between victim-specific and broad injunctive relief, and there is similarly no basis for the court of appeals' across-the-board conclusion that the public interest in obtaining victim-specific relief is inevitably minimal. There is,

accordingly, no basis for precluding the EEOC from obtaining such remedies.

The court of appeals' decision, if allowed to stand, could seriously compromise the EEOC's ability to enforce the antidiscrimination laws. First, the court of appeals' characterization of the relief that remains open to the EEOC—"large-scale injunctive relief," J.A. 21—has no foundation in the statutory language and its meaning is necessarily indeterminate. Second, injunctive relief may not be adequate to deter employment discrimination in some circumstances, either because the EEOC cannot establish the prerequisites for injunctive relief, or because injunctive relief can be a toothless sanction. But under the court of appeals' decision, the EEOC would be unable to supplement injunctive relief with monetary sanctions against any employer who, like respondent, requires all employees to sign arbitration agreements. To be sure, this Court recognized the ability of employers to bargain with their employees for arbitration clauses that require the arbitration of suits brought by employees. See *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302 (2001). But such agreements cannot prevent the EEOC from pursuing those enforcement actions that are essential to the public functions Congress intended the EEOC to serve.

Finally, no countervailing policy considerations support the court of appeals' rule. The rule is not needed to prevent victims of discrimination from obtaining double recoveries through EEOC actions, because mechanisms are readily available for that purpose. Nor does the rule reduce redundant or duplicative proceedings; to the contrary, it would virtually require duplicate arbitral and judicial proceedings, because the victim can often obtain victim-specific remedies only in

the arbitral forum, while the EEOC ordinarily seeks (and may be limited to seeking) its remedies in federal court. Nor is the court of appeals' rule needed to promote respect for the private arbitration system; to the contrary, this Court has recognized that EEOC enforcement in a case like this respects, rather than circumvents, the private arbitration system. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Just as the government may seek victim-specific relief for discrimination from a State even though a private action for the same relief would be barred by sovereign immunity, see *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 121 S. Ct. 955, 968 (2001), so too an EEOC action for victim-specific relief for discrimination may proceed even though a private action for the same relief may be barred by an arbitration agreement. In each case, permitting the public action while barring the private one simultaneously respects both the bar (whether imposed by sovereign immunity or by a private contract) and the enforcement of the federal antidiscrimination laws.

ARGUMENT

I. THE EEOC'S STATUTORY AUTHORITY TO OBTAIN VICTIM-SPECIFIC RELIEF IN A PUBLIC ENFORCEMENT ACTION DOES NOT CONFLICT WITH THE TERMS OR POLICIES OF THE FEDERAL ARBITRATION ACT

The court of appeals held that a private arbitration agreement barred the EEOC from obtaining victim-specific remedies in this case.[4] Denying the EEOC the

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[4] The question presented in this case assumes that the private arbitration agreement is enforceable as between the employee and the employer. But cf. J.A. 24-35 (King, J., dissenting). If not en-

right to obtain victim-specific remedies on the basis of an arbitration agreement to which it was not a party contravenes the plain text of Title VII, as incorporated in the ADA. Title VII expressly gives the EEOC a distinct cause of action with a full range of remedies and grants the EEOC—not the employee— control over litigation it initiates, even when it seeks victim-specific remedies. That statutory authorization cannot be disregarded on the ground that the terms or policies of the FAA conflict with the EEOC's express statutory rights. The terms and the policies of the FAA are fully vindicated by ensuring that the parties to the arbitration agreement respect the agreement. Neither the terms nor the policies of the FAA support any limit on the statutory rights of the EEOC, which has not agreed to arbitrate any dispute.

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forceable as a private matter, the agreement plainly has no impact on the EEOC. The assumption that an arbitration agreement is enforceable as between the employee and the employer may not always hold true. See, *e.g.*, *Green Tree Fin. Corp.* v. *Randolph*, 121 S. Ct. 513, 522-523 (2000) (agreement unenforceable if it imposes "prohibitive costs" on the statutory claimant); *Duffield* v. *Robertson Stephens & Co.*, 144 F.3d 1182, 1187-1200 (9th Cir.) (agreement mandating arbitration of Title VII claims unenforceable under the Civil Rights Act of 1991), cert. denied, 525 U.S. 982 and 525 U.S. 996 (1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (agreement unenforceable unless, at a minimum, it establishes an "arbitration arrangement" that "provides for all of the types of relief that would otherwise be available in court"); *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 694 (Cal. 2000) (arbitration agreement unenforceable as "unconscionable" where it lacked "mutuality" and did not "permit the full recovery of damages for employees").

A. The Fourth Circuit's Result Is Inconsistent With The Text And Structure Of Title VII

1. As originally enacted, Title VII authorized only a private right of action against employers and a public action (by the Attorney General) in "pattern or practice" cases. See generally *General Tel. Co. of the N.W., Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980). In 1972, Congress amended Title VII to provide the EEOC with independent authority to bring suit in court, thus creating a dual system of private and public enforcement. See 42 U.S.C. 2000e-5(a), 2000e-5(f)(1).

2. a. As part of this dual enforcement scheme, the text of Title VII (and, thus, of the ADA, which incorporates that text) expressly grants the EEOC its own cause of action, and it grants the EEOC the right to obtain all statutory remedies in any action it brings. Section 706(f)(1) of Title VII provides that, if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent." 42 U.S.C. 2000e-5(f)(1). Section 706(g) further provides that if the court finds intentional discrimination in such an action, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g)(1). Accordingly, as the Court explained in *General Telephone*, "Section 706(f)(1) specifically authorizes the EEOC to bring a civil action against any respondent not a governmental entity * * *, the purpose of the action being to terminate unlawful practices *and to secure appropriate relief, including 'reinstatement or hiring . . ., with or without*

back pay.'" 446 U.S. at 324 (emphasis added) (quoting 42 U.S.C. 2000e-5(g)).

The text of Title VII does not limit the relief available to the EEOC or otherwise distinguish the relief available to the EEOC from the relief available to a private litigant. To the contrary, the statute in clear terms authorizes the EEOC to obtain all of the listed forms of relief. "[T]he EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals." *General Tel.*, 446 U.S. at 324. Indeed, Congress gave the EEOC complete control over the relief—even the victim-specific relief—it sought. As the Court explained in *General Telephone*, the EEOC could seek the most effective overall relief in a particular case even where some victims of discrimination "may appear to be disadvantaged" by the EEOC's choice. *Id.* at 331.

In 1991, when Congress amended Title VII and the ADA to provide for a damages remedy, Congress specifically reaffirmed that the EEOC should have available the full range of statutory remedies—which now included damages—when it brings an enforcement action. The amendments specify that damages are available to a "complaining party" in a Title VII suit and in an ADA suit. 42 U.S.C. 1981a(a)(1) and (a)(2). Although a damages remedy might be thought to be peculiarly victim-specific, the term "complaining party" was not limited to employees who brought claims to the EEOC. Instead, Congress specifically decided that the EEOC should also have the right to obtain the new damages relief after concerns were raised that the failure to do so in an earlier version of the bill would "undermine the [EEOC's] ability to enforce Title VII and the ADA." 137 Cong. Rec. 28,860-28,861 (1991)

(letter from EEOC Chairman Evan J. Kemp, Jr. to Sen. Kennedy).[5] Accordingly, the term "complaining party" was defined to include "the Equal Employment Opportunity Commission, the Attorney General, [or] a person who may bring an action or proceeding under [Title VII or the ADA]." 42 U.S.C. 1981a(d)(1)(B). In short, under both the older version of the statute and the 1991 amendments, the EEOC is plainly authorized "to sue in its own name to enforce federal law by obtaining appropriate relief"—which now includes damages—"for those persons injured by discriminatory practices forbidden by the Act." *General Tel.*, 446 U.S. at 324-325.

b. The court of appeals' rule precluding the EEOC from obtaining victim-specific relief is flatly inconsistent with Title VII's express authorization of such relief in a public enforcement action. Congress could have structured Title VII so that only a subset of remedies was available to the EEOC, if it believed that only a subset of remedies genuinely vindicates the interests of the public, rather than the private interests of the victim. Alternatively, Congress could have permitted victim-specific relief only in cases in which an individual victim is the plaintiff or intervenor. Had it done so, an individual's agreement to arbitrate discrimination claims likely would have barred such relief in a public enforcement action, because the arbitration agreement may well bar the individual from intervening in such a suit. See pp. 24-26, *infra*. Instead of

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[5] The letter cited in text warned that, without including the EEOC as a "complaining party," the EEOC might "have a duty to refer all cases of intentional discrimination to private attorneys because, by filing suit, the [EEOC] would dramatically reduce the relief available to the victims [who would be able to seek compensatory and punitive damages in their own actions]."

pursuing either of those courses, Congress chose to permit the EEOC to pursue victim-specific equitable (and now, legal) relief in a public enforcement action, regardless of whether the private complainant chose to intervene. The court of appeals' decision depriving the EEOC of the right to obtain victim-specific relief is inconsistent with the text of Title VII.

3. a. The court of appeals' decision is also inconsistent with the structure of Title VII. That structure makes clear that, although private litigants bring the vast majority of cases under the federal anti-discrimination statutes, the EEOC's statutory rights to bring suit are independent of and superior to the rights of private individuals. When a charge is filed, the EEOC has exclusive jurisdiction over the charge for 180 days or until a right-to-sue letter has been issued. See 42 U.S.C. 2000e-5(f)(1).[6] The private complainant has no separate cause of action if the EEOC files suit during that time, although the employee may intervene in the EEOC's suit. 42 U.S.C. 2000e-5(f)(1). Indeed, the EEOC may initiate and maintain its suit, even if the individuals for whom it seeks relief disavow the suit and claim not to want relief. See, *e.g.*, *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535-1537 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997); *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1195-1196 & n.8

[6] Even after the 180-day period, a private suit may be commenced only if the charging party has received a right-to-sue letter from the EEOC. See 42 U.S.C. 2000e-5(f)(1). The EEOC is not beholden to the individual charge. The EEOC can file its own charge. See 42 U.S.C. 2000e-5(b). The EEOC can expand the investigation of a charge to include "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the [charge]." *General Tel.*, 446 U.S. at 331. Once a charge is filed, it cannot be withdrawn without the EEOC's consent. See 29 C.F.R. 1601.10.

(5th Cir. 1984). Cf. *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 302 (1985) (permitting public enforcement suit under Fair Labor Standards Act over the objections of employees because "the purposes of the Act require that it be applied even to those who would decline its protections"). And the attorneys appointed by the EEOC in a public enforcement action represent the EEOC; they do not represent the charging party. See 42 U.S.C. 2000e-4(b)(2) (attorneys appointed by the EEOC "appear for and represent the Commission"). In sum, Title VII provides the EEOC with a distinct right to sue that is not the individual complaining employee's to bargain away.

The statutory structure gives the EEOC particular control over the choice of forum in a public enforcement action. Title VII addresses with great precision the fora in which the EEOC may bring suit—any federal district court in the State in which the discrimination occurred, the district in which the employment records are maintained, the district in which the aggrieved person would have worked, or, if necessary to find the respondent, the district of the respondent's principal office. 42 U.S.C. 2000e-5(f)(3). Even though the private complainant's right to individual damages will be finally determined in the EEOC suit, the employee has no control whatever over the forum in which the EEOC's discrimination claim will be brought and no right to bring an individual suit in another forum once the EEOC's litigation has begun. Congress left the choice of forum in such a suit entirely up to the EEOC.

b. The court of appeals' decision contravenes that statutory structure, because it gives the choice of forum in part to a private individual. This Court has observed that an individual's agreement to arbitrate disputes "is, in effect, a specialized kind of forum-selection clause

that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Thus, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). See also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 29 (1991); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989). In a public enforcement action, however, Congress granted the choice of forum to the EEOC, not to private individuals. The EEOC in this case has not chosen to bring its claim or any part of its claim—including its claim for victim-specific relief—in an arbitral forum.[7] Accordingly, the private individual's choice of an arbitral forum, although binding on that individual, can have no effect on the EEOC.[8]

In short, Congress clearly and expressly gave the EEOC an enforcement action and choice of both

[7] As the court of appeals noted (J.A. 23), there could be a significant question whether the EEOC has authority to pursue a discrimination claim in an arbitral forum. See 42 U.S.C. 2000e-4(b)(2) ("Attorneys appointed under [Title VII] may, at the direction of the Commission, appear for and represent the Commission in any case *in court*.") (emphasis added).

[8] Congress has encouraged alternative—including arbitral--resolution of private discrimination claims "[w]here appropriate and to the extent authorized by law." 42 U.S.C. 12212; see *Wright* v. *Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 n.2 (1998). With respect to public discrimination claims, however, it has instead required the EEOC to attempt "conference, conciliation, and persuasion" before bringing suit. 42 U.S.C. 2000e-5(b); see also 2000e-5(f)(1). And, if conciliation fails, it has specified federal district courts as the fora in which EEOC suits are to be brought.

remedies and fora. The court of appeals' approach effectively gives control over the types of relief the EEOC may obtain and the forum in which they may be obtained to private parties, based on arbitration agreements they (but not the EEOC) have signed. That decision is inconsistent with Congress's choice.

B. The FAA Does Not Support Any Limitation On the Remedies The Antidiscrimination Laws Make Available To The EEOC, Because The FAA's Terms And Policies Are Fully Vindicated By Holding The Complainant To His Agreement To Arbitrate

1. The court of appeals justified its extra-statutory limitation on the remedies the EEOC may obtain in this case by elevating what it believed to be the FAA's policy over the plain terms of Title VII. The court of appeals reasoned that "[t]o permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample th[e] strong policy favoring arbitration" embodied in the FAA. J.A. 20. In the court's view, a "balance" must be struck between the "competing policies" of the FAA and the antidiscrimination statutes, J.A. 21, by depriving the EEOC of its statutory right to obtain victim-specific remedies when the victim (but not the EEOC) has agreed to arbitrate employment-related disputes. See also *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998) (stating that EEOC's public enforcement role and the FAA represent "competing public interests"). That analysis is flawed on two levels—there is no conflict between the FAA's policy and Title VII's text, and even if there were, it would provide no basis for disregarding Title VII's grant of authority to the EEOC.

2. There is no conflict between the terms or policies of the FAA and the antidiscrimination statutes, and there is thus no basis for the court of appeals' conclusion that the remedies available under the antidiscrimination statutes must give way to accommodate the FAA. The terms and policies of the FAA are fully vindicated by holding the private complainant (who agreed to arbitration) to his agreement, while permitting the EEOC (which has not agreed to arbitration) to pursue the full range of remedial options authorized by the antidiscrimination statutes.

a. The FAA, "as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp.*, 473 U.S. at 625. The "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Id.* at 626. Because arbitration "is a matter of contract," a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Forcing arbitration on an unconsenting party is inconsistent with both the terms and the policies of the FAA.

b. In the present posture of this case, it must be assumed that Baker himself signed a valid and binding agreement to arbitrate employment-related disputes with respondent. See note 3, *supra*; Pet. 5 n.1. That means that Baker must arbitrate his individual claim against respondent under the ADA. Therefore, if the EEOC had determined that it would not bring suit and Baker's own cause of action had thereby ripened, and if Baker had filed his own suit against respondent without attempting arbitration, Baker's agreement would bar

his suit. For that reason, in the vast majority of cases (see p. 26 & note 9, *infra*), an employee's agreement to arbitrate will preclude all judicial consideration of his complaint.

Moreover, even in the relatively rare cases in which the EEOC initiates a public enforcement action, the arbitration agreement significantly restricts the options available to the private employee. Thus, for example, if Baker attempted to intervene in the EEOC's suit under 42 U.S.C. 2000e-5(f)(1), his agreement to arbitrate his disputes with his employer would ordinarily bar intervention. That likely inability to intervene is significant. As this Court noted in *General Telephone*, in a public enforcement action "the EEOC is authorized * * * to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged." 446 U.S. at 331. Indeed, "[t]he individual victim is given his right to intervene for this very reason," *ibid.*—*i.e.*, to protect his own rights where the EEOC has determined that the public interest would best be served by compromising or even abandoning some of the claims for relief for that individual. By agreeing to arbitrate his claims, Baker has agreed, *inter alia*, to forego that statutory right to intervene in a judicial action brought by the EEOC; Baker is likely to face the choice of enforcing his own right to relief in an arbitral forum or not at all. Accordingly, whether or not the EEOC initiates a public enforcement action, the terms and policies of the FAA are fully vindicated by ensuring that the arbitration agreement binds the parties who signed it.

In short, the EEOC did not agree to arbitrate its dispute with respondent. Nothing in the terms of the FAA (which merely provide that agreements to arbitrate are enforceable) or the policies of the FAA (which

favor arbitration where the parties have agreed to it) prevents the EEOC from invoking its statutory authority to bring a public enforcement action against respondent and to obtain all statutory remedies (including victim-specific remedies) provided for such an action.

3. In addition, even if the policy favoring arbitration embodied in the FAA were implicated in this case, permitting the EEOC to seek full relief in its own actions would not have a serious impact on that policy. The EEOC has the primary enforcement role under the federal antidiscrimination statutes in the sense that it sues to vindicate the "overriding public interest in equal employment opportunity." *General Tel.*, 446 U.S. at 326. When the EEOC elects to exercise its independent authority to sue, its role is predominant. The EEOC, however, has very limited resources. As a percentage of the total lawsuits filed under the antidiscrimination statutes, the number of lawsuits filed by the EEOC is quite low.[9] Moreover, as explained above, arbitration agreements continue to constrain the litigation options of the signatories even in the relatively rare cases in which the EEOC initiates a public enforcement action. Accordingly, the ability of the EEOC to sue and obtain victim-specific relief represents at most a minimal encroachment on the regime of private arbitration.

4. Finally, even if (contrary to fact) there were some tension between the text and structure of Title VII and the policies underlying the FAA, that would not justify

[9] For example, the EEOC filed 439 lawsuits in fiscal year 1999 and 291 in 2000. See http://www.eeoc.gov/stats/litigation.html (May 15, 2001). The total number of fair employment lawsuits filed in federal court during fiscal year 1999 was 22,412. See Daily Lab. Rep. (BNA) A-1 (Mar. 24, 2000).

the court of appeals' decision to elevate congressional policy over statutory text. Here, the text of Title VII clearly gives the EEOC the right to pursue a distinct statutory enforcement action and to secure the full range of remedial options. Enforcing the terms of an arbitration agreement against its signatories fully vindicates the policies underlying the FAA. But if that were not the case, the policies underlying the FAA would not provide a sufficient basis for imposing judicial limitations on remedies clearly and expressly made available to the EEOC under Title VII.

II. BECAUSE THE EEOC SEEKS TO VINDICATE THE PUBLIC INTEREST WHEN IT SEEKS VICTIM-SPECIFIC REMEDIES, THERE IS NO BASIS FOR A CONCLUSION THAT IT MERELY REPRESENTS PRIVATE PARTIES IN SUCH CASES OR SHOULD BE BOUND BY PRIVATE AGREEMENTS

On a broader level, the structure of Title VII embodies a congressional policy that there can be a strong public interest in obtaining each of the forms of relief authorized by statute and a congressional delegation to the EEOC—not the courts—of the authority to decide when the public interest warrants bringing a public enforcement action to obtain that relief. The court of appeals should have honored—not disputed—that congressional policy and that delegation of authority.

A. Congress's Broadening Of The Public Enforcement Role In 1972 Beyond "Pattern Or Practice" Cases Was Based On The Premise That There Is A Strong Public Interest In Remedying Individual Cases Of Discrimination

1. As noted above, see pp. 2-3, *supra*, before 1972, Title VII provided for public enforcement (by the Attorney General) only in cases involving a "pattern or practice" of discrimination. See 42 U.S.C. 2000e-6 (1970). Such actions "did not depend upon the filing of a charge with the EEOC; nor were they designed merely to advance the personal interest of any particular aggrieved person." *General Tel.*, 446 U.S. at 327. Instead, they were designed to attack widespread discrimination that was likely to affect a greater number of employees and to warrant broad injunctive relief.

In 1972, Congress decided to broaden the public enforcement role by providing for EEOC authority to bring actions not only in "pattern or practice" cases whose enforcement had previously been assigned to the Attorney General, but also in cases in which the only claim was that there had been a particular act or acts of discrimination against one or more private individuals. Congress took that step because the "failure to grant the EEOC meaningful enforcement powers [had] proven to be a major flaw in the operation of Title VII." S. Rep. No. 415, 92d Cong., 1st Sess. 4 (1971). Congress bestowed litigation authority on the EEOC on the premise that the EEOC would protect "the overriding public interest in equal employment opportunity" through direct "[f]ederal enforcement," even in individual cases of discrimination. 118 Cong. Rec. 4941 (1972).

Congress thus recognized in 1972 that discrimination even against a single person could offend not merely an individual, private interest, but society's interest in

rooting out and remedying discrimination. Congress did not give the EEOC the resources to litigate *all* possibly meritorious individual claims of discrimination. But Congress's extension of authority to the EEOC to pursue cases of individual discrimination embodied Congress's determination that, when the EEOC selects a case to litigate, there is a dominant public (not merely a private) interest in ending the discrimination in that case, in obtaining compensation for the victim, and in deterring the defendant and other employers from further discrimination.

2. This Court underscored that the EEOC's interest in obtaining victim-specific relief is primarily a public—not a private—interest in its decision in *General Telephone*. In *General Telephone*, the employer argued that the EEOC's Title VII suits should be considered "representative" actions, subject to the prescriptions of Federal Rule of Civil Procedure 23, because the EEOC in bringing a public enforcement action is simply standing in for the private interests of the individual employees who benefit from the suit. 446 U.S. at 326. This Court disagreed, ruling that the EEOC "sue[s] in its own name to enforce federal law" and "is not merely a proxy for the victims of discrimination." *Id.* at 324-326. This Court concluded that, "[w]hen the EEOC acts, *albeit at the behest of and for the benefit of specific individuals*, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* at 326 (emphasis added). The court specifically relied on that public interest in concluding that "the EEOC's enforcement suits should not be considered representative actions subject to Rule 23." *Ibid.* As this Court explained, even when the EEOC seeks "specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of

discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.'" *Ibid.* (quoting 118 Cong. Rec. at 4941).

3. The court of appeals' decision is premised on a disregard of both the congressional determination that the public interest may be served by obtaining victim-specific relief and the congressional delegation of authority to the EEOC—not the courts—to determine when a public enforcement action seeking such relief should be brought. The court of appeals reasoned that "the EEOC's public interest is minimal" when it seeks victim-specific relief, because in that context "the EEOC seeks primarily to vindicate private, rather than public, interests." J.A. 21. In the court's view, only "when the EEOC is pursuing large-scale injunctive relief" does "the balance tip[] in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action." J.A. 21. There was, however, no warrant for the court of appeals to assess the strength of the public interest in various types of remedy. By expanding the public enforcement role in 1972, Congress determined that there is a sufficient public interest in victim-specific relief whenever the EEOC initiates a public enforcement action and determines that such relief is worth pursuing. Congress did not categorically preclude victim-specific remedies, but left to the EEOC the judgment as to which remedies would best serve the public interest in a particular enforcement action. Because Congress has already made the relevant policy judgment about the strength of the public interest in such cases, the court of appeals erred in restricting the EEOC's statutory

authority based on second-guessing the congressional judgment.[10]

B. This Court Has Frequently Recognized The Broad Public Purposes Served By Victim-Specific Remedies

This Court has recognized that victim-specific remedies are vital to the public—not merely private—goals of the antidiscrimination statutes in other contexts as well. The Court has noted that back pay, for example, serves both "deterrence and * * * compensation objectives." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995). Back pay does not simply make the individual victim whole; it provides the "spur or catalyst which causes employers * * * to endeavor to eliminate, so far as possible, [their discriminatory practices]." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975) (quoting *United States* v. *N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)). It is therefore an essential weapon in the EEOC's arsenal.

Reinstatement and similar remedies likewise provide public benefits beyond the private benefit to the reinstated employee. The reinstatement of an employee previously separated sends a powerful message to the entire workplace that discrimination will not be tolerated and that disfavored individuals cannot be removed from the workplace. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 195 (1941) (noting, in labor relations case, that "[r]einstatement may be the effective

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[10] Elsewhere in its opinion, the court stated that "the Supreme Court has recognized implicitly that the EEOC, *acting in its public role*, is not bound by private arbitration agreements." J.A. 19 (emphasis added; citing *Gilmer*, 500 U.S. at 28, 32). The court ignored the fact that the EEOC acts "in its public role" when it seeks victim-specific remedies, and it thereby "is not bound by private arbitration agreements."

assurance of the right of self-organization"); *Blim* v. *Western Elec. Co.*, 731 F.2d 1473, 1478 (10th Cir.) ("[R]einstatement has the dual purpose of protecting the discharged employee and demonstrating the employer's good faith to the other employees."), cert. denied, 469 U.S. 874 (1984).

Punitive damages are even more closely geared to the public interest, because they are designed to punish the wrongdoer rather than to compensate or "make whole" the victim of discrimination. The court of appeals did not expressly address the question whether the public interest in obtaining punitive damages is "dominant" or "minimal," and it is therefore unclear on what basis the court precluded that element of victim-specific relief. See J.A. 21 (ruling that the EEOC's "public interest is minimal" when it seeks "'make-whole' relief for a charging party" without any discussion of punitive damages). This Court has recognized, however, that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). See also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 281 (1994) ("The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions."). That is primarily a public, not private purpose, and there is accordingly no basis, even under the court of appeals' reasoning, to preclude the EEOC from obtaining punitive damages in appropriate cases.[11]

[11] In other areas of public enforcement, the courts of appeals have recognized that the federal government may exercise its public enforcement authority even when it seeks relief for individuals whose private claims would otherwise be barred. *E.g.*, *Herman* v. *South Carolina Nat'l Bank*, 140 F.3d 1413, 1422-1427 (11th Cir. 1998) (enforcement action brought under the ERISA), cert. denied, 525 U.S. 1140 (1999); *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 688-697 (7th Cir. 1986) (en banc) (same). The reason is simple: *"[T]he United States has an interest in enforcing federal law that is independent of any claims of private citizens;"* by obtaining "monies" for the individual "beneficiaries" of a federal statute, the government vindicates its "unique, distinct, and separate public interest" in maintaining compliance with federal law. *Id.* at 693 (quoting *Donovan* v. *Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984)).

C. Preventing The EEOC From Recovering Victim-Specific Remedies In Any Case In Which There Is A Private Arbitration Agreement Would Seriously Compromise The EEOC's Ability To Enforce The Antidiscrimination Statutes

1. The decision of the court of appeals, if allowed to stand, could have serious consequences for the EEOC's public enforcement role. The court of appeals ruled that the EEOC may not recover victim-specific remedies in any case in which the victim of discrimination has signed an arbitration agreement with an employer. That ruling opens the door to an across-the-board limit on the EEOC's enforcement powers. By adopting a company-wide mandatory arbitration program, an employer could immunize itself from any EEOC action seeking victim-specific remedies.

2. This case illustrates the point. Respondent is a national employer, and, like many national employers, respondent has included an arbitration provision in its standardized employment application, one that it claims is tendered to all of its prospective employees. See J.A. 56 (affidavit of respondent's general counsel stating that "[a]ll prospective Waffle House employees are

required to * * * sign a Waffle House employment application prior to being hired" and that "Waffle House's employment application contains a provision requiring all disputes between the employee signing the application and Waffle House to be submitted to arbitration"); J.A. 59 (arbitration agreement in this case). Under the rationale of the court of appeals, the EEOC could never file a suit for damages or other victim-specific relief against respondent because all of respondent's employees have agreed to arbitrate. Regardless of the extent to which respondent engaged in forbidden discriminatory practices, the EEOC would not be able to recover victim-specific remedies or use the threat of punitive damages to deter future discrimination. By the simple expedient of including a standard arbitration provision in its employment applications, respondent would undercut the EEOC's ability to police respondent's compliance with the antidiscrimination statutes.

3. The decision of the court of appeals does leave the EEOC free to pursue a claim for "broad injunctive relief." The scope of remaining EEOC authority under that standard, however, is unclear and, in any event, it fails to fill the enforcement gap left by the court's preclusion of the EEOC from pursuing victim-specific remedies.

a. It is not clear what the court of appeals meant when it used the term "large-scale injunctive relief," J.A. 21, to describe the relief that the EEOC could continue to obtain in the face of a private arbitration agreement. See also J.A.8 ("broad-based injunctive relief"), 23 ("broad injunctive relief"). If the court meant to apply a test that would turn on the number of employees affected, then the court's rule would appear to make an unjustifiable and quite indeterminate distinction

between the remedies available depending on the size of the firm that has practiced discrimination and the number of workers involved. On the other hand, if the court meant to permit all injunctive relief while excluding relief that would result in money payments or reinstatement, then it would appear to permit specific injunctions directed at the treatment of specific employees, regardless of whether they had signed arbitration agreements—a result that appears to be at odds with the court's reasoning. At bottom, the difficulty of drawing the line intended by the court of appeals is the result of the court's misguided effort—without any statutory guidepost—to distinguish generically among types of relief on the theory that some serve the public interest more than others. Congress decided that all authorized forms of relief are in the public interest (even if they may be in the private interest of the victims as well) when it made all of them available in public enforcement actions brought by the EEOC. That is sufficient to resolve this case.

b. Not only is it difficult to define the relief that would remain open in theory to the EEOC, but it also is not clear that in practice the EEOC would always be able to obtain meaningful injunctive relief under the court of appeals' rule, even in otherwise meritorious cases. In this case, for example, the court of appeals noted respondent's argument "that the EEOC is not entitled to broad injunctive relief because its claim relies exclusively on the incident involving Baker," but "le[ft] to the district court the question of whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks." J.A. 24 n.3. If that means that in this case or in other cases the EEOC would be unable to maintain an otherwise meritorious action because "broad injunctive relief" would be unavailable, see, *e.g.*,

United States v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *EEOC* v. *General Lines, Inc.*, 865 F.2d 1555, 1565 (10th Cir. 1989); but cf. *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1250-1251 (10th Cir. 1999), that result would completely negate the EEOC's independent statutory right to bring an action. Turning the statutory scheme on its head, the court of appeals' rule would preclude the EEOC from bringing any action simply because a private party has agreed to arbitrate.

Moreover, an important goal of the EEOC in deciding whether to bring a public enforcement action is frequently to obtain clarification of the law to guide employers and employees alike. And "[t]he disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misapplication of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. at 358-359. Insofar as the EEOC is barred from litigating otherwise meritorious cases by private arbitration agreements, its ability to achieve those public objectives is thwarted.

c. In addition, even in cases in which the EEOC's suit is not entirely precluded, broad injunctive relief, while an important weapon in the EEOC's enforcement arsenal, simply cannot substitute for meaningful victim-specific relief.[12] As this court explained in *Albemarle*

[12] As this Court has explained—most recently in *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302, 1313 (2001)—"there are real benefits to the enforcement of arbitration provisions," including avoidance of litigation costs. Nonetheless, arbitration does not produce precedent to guide employers and employees not involved in the particular case—an important function of the EEOC's enforcement role. Even if arbitration clauses merely had the effect of precluding the EEOC from litigating issues that have to do with back pay, reinstatement, damages, and the like, one important public role of the EEOC would be limited.

Paper, "[i]f employers faced only the prospect of an injunction order, they would have little incentive to shun practices of dubious legality." 422 U.S. at 417. Congress made a similar judgment in the Civil Rights Act of 1991. Determining that the existing range of essentially equitable remedies (including back pay) may not be effective, Congress added compensatory and punitive damages to the remedial mix. See Pub. L. No. 102-166, § 2, 105 Stat. 1071 (citing the need for "additional remedies"). With respect to the EEOC in particular, Congress determined that the EEOC's enforcement authority would be undermined if it did not enjoy the full range of remedies available to private litigants. Therefore, Congress granted the EEOC the authority to pursue compensatory and punitive damages, despite their victim-specific character. See p. 20, *supra*. In many cases, employers need the "spur," *Albemarle Paper*, 422 U.S. at 418, of the full range of sanctions to prompt them into the type of self-examination that will deter future acts of discrimination.

Indeed, the decision of the court of appeals threatens to relegate the EEOC to its pre-1972 state—an agency without the necessary tools to enforce violations of the antidiscrimination statutes and dependent on the actions of private parties to enforce the law. Before 1972, employers would "shrug[] off the [EEOC's] entreaties" in "cases posing the most profound consequences" because of "the unlikelihood of the parties suing them." H.R. Rep. No. 238, 92d Cong., 1st Sess. 9 (1971). Under

the court of appeals' decision, an employer, by the simple act of attaching arbitration language to an employment application, can undo Congress's decisions in 1972 and 1991 to provide the EEOC with full enforcement authority in court, including the authority to vindicate the public interest by seeking and recovering the entire array of statutory remedies.

D. There Are No Other Countervailing Policy Considerations That Counsel Against Allowing The EEOC To Obtain The Full Range Of Statutory Remedies

1. Adopting the EEOC's position in this case would not lead to an impermissible double recovery for the victims of discrimination. As this Court explained in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 n.14 (1974), "in cases where the employee has first prevailed [in arbitration], judicial relief can be structured to avoid * * * windfall gains" that the employee would obtain through "duplicative recoveries." See also *General Tel.*, 446 U.S. at 333 (stating that it "goes without saying that the courts can and should preclude double recovery by an individual"). Thus, although the damages sought by the EEOC to vindicate the public interest in eradicating discrimination are paid over to the individual, there is no risk that the individual will receive an impermissible windfall. The EEOC is free to pursue its claim for victim-specific remedies, but a court may "adjust the relief accordingly" (*ibid.*) if the individual for whom the EEOC seeks such remedies has already recovered monies in the arbitral forum.[13]

[13] This case does not present any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action. The availability of relief in such cases would require resolution of questions concerning whether victim-specific relief would result in a double recovery, whether victim-specific relief is "appropriate" under 42 U.S.C. 2000e-5(g)(1) after the victim has satisfied his own claim through litigation or settlement, and whether principles of res judicata would bar an award of victim-specific relief under a particular statutory scheme and set of facts. In cases brought by the EEOC, courts of appeals have relied on principles of res judicata (in litigated or arbitrated cases) or mootness (in settled cases) to bar the EEOC from obtaining victim-specific relief after litigation or settlement of the victim's claims. See, *e.g.*, *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993) (ADEA case; res judicata); *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) (ADEA case; res judicata); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (Title VII case; mootness); but cf. *United States Steel Corp.*, 921 F.2d at 494 n.4 (noting distinctions between ADEA enforcement scheme and scheme applicable to Title VII and ADA cases). In this case, Baker has neither litigated nor settled his individual claim. Accordingly, the question presented is not one of res judicata or mootness, but rather whether Baker's mere choice of an arbitral forum for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action. See *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 463 (6th Cir. 1999) (distinguishing cases involving "a prior suit" or "a prior arbitration" that "raised or resolved the issues raised in the EEOC's complaint," in holding that a mere agreement to arbitrate does not preclude the EEOC from suing in its own name and recovering victim-specific remedies).

2. The court of appeals' rule is not supported by considerations of judicial economy and efficiency. If the EEOC is permitted to obtain in a single action both victim-specific relief and any general injunctive relief to which it is entitled (as Title VII provides), the complainant may choose to forego the arbitral forum altogether.[14] If, however, the EEOC cannot obtain

[14] The Second Circuit in *Kidder Peabody* erred in stating that an employee in a case like this can wait for the EEOC to prevail in its lawsuit and then bring the employee's own claim for victim-specific remedies in arbitration. 156 F.3d at 303 ("If the EEOC is

victim-specific relief (as the court of appeals held), parallel proceedings likely would be necessary; the EEOC generally litigates (and is perhaps limited to litigating, see note 7, *supra*) in court, while the individual would be required to pursue the arbitral forum to obtain any victim-specific relief. This Court in *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302, 1313 (2001), noted that "litigation costs" can be "compounded" by "the necessity of bifurcation of proceedings" into parallel arbitral and judicial cases. The court of appeals' decision would make those extra costs virtually inevitable.

3. Nor is it anomalous that, under the approach advocated by the EEOC, the EEOC will be able to recover victim-specific remedies that could not be recovered in a private lawsuit initiated by the victim herself. That result flows logically from the dual enforcement structure of the antidiscrimination statutes, as this Court recognized in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, this Court held that an employee could be required to arbitrate a claim of discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* In reaching that conclusion, this Court stated that it was "unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA." 500 U.S. at 28.

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successful, the employee could pursue back pay and liquidated damages through arbitration armed with a federal court's finding of discrimination, which certainly would have collateral estoppel effect in the arbitral proceeding."). By the time the EEOC has prevailed, the employee is very likely to be beyond the time limit for bringing his own claim, and the employee would therefore likely be precluded from capitalizing on the EEOC's lawsuit in that way.

The Court explained that "[a]n individual ADEA claimant subject to an arbitration agreement [is] still * * * free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Ibid.* Such a charge triggers the EEOC's statutory enforcement responsibilities, including its right to file a public enforcement action and to obtain victim-specific relief. *Gilmer* thus suggests that a private agreement to arbitrate affects private rights only; it has no impact on the public enforcement role of the EEOC.

4. In other contexts as well, the Court has recognized that the public interest in obtaining victim-specific remedies is sufficient to justify a government suit that seeks only such remedies (and does not even seek injunctive relief), even when the victim himself would be entirely disabled from bringing the suit. In *Board of Trustees of the University of Alabama* v. *Garrett*, 121 S. Ct. 955 (2001), this Court held that the Constitution bars a private individual from suing a nonconsenting state employer for money damages under Title I of the ADA. That constitutional bar is based on "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Notwithstanding that fundamental bar, however, the Court recognized that a public enforcement action seeking the very same money damages denied to a private plaintiff would not be barred. As the Court stated, the standards of Title I of the ADA "can be enforced by the United States in actions [against State employers] for money damages." 121 S. Ct. at 968 n.9. Accord *Alden* v. *Maine*, *supra* (Fair Labor Standards Act).

Garrett and *Alden* provide a compelling rejoinder to the court of appeals' concern that allowing the EEOC to sue for victim-specific remedies in cases of this nature will result in an impermissible circumvention of the "federal policy embodied in the FAA." J.A. 20. In the context of state sovereign immunity, permitting the federal action to obtain victim-specific remedies while prohibiting private suits against States simultaneously respects state sovereignty and the federal law being enforced. For similar reasons, permitting an EEOC action for victim-specific remedies while prohibiting private suits by parties who agreed to arbitrate respects both the binding nature of arbitration agreements on the parties and the federal antidiscrimination laws.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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